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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

ROY H. ROBINSON, ADMINISTRATOR OF the Estate of John C. Robinson, deceased, *appellant*,
v.
THE UNITED STATES.
No. 335.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Asserting a claim for $123,041.37 (Tr. 11), appellant recovered a judgment for $33,964.10 from which an appeal was taken because of the rejection of a large part of two of the eight principal items. One of the rejected items grows out of the liquidated damages clause of the contract, and the other out of the clause under which the contractor guaranteed the good condition of the work for one year after acceptance. (Tr. 27, Br. 1, 2.)

THE FACTS.

In accordance with the Act approved March 2, 1899, the Secretary of the Treasury accepted plans, drawings, and specifications submitted by Mr. Cass Gilbert for the construction of the United States

Custom House in New York City. (Tr. 13.) The construction was subdivided into several principal parts, (1) the excavation and foundation work; (2) the walls and structural steel work; (3) the mechanical equipment; (4) the interior finish, etc. Separate contracts were let for the different parts. The work commenced and proceeded in the order of the respective parts with some general overlapping of the different contracts with respect to time.

When the construction work progressed to the stage where the interior finish could be commenced the Treasury Department, March 9, 1905, through its Supervising Architect advertised for bids. Because of a probable shortage in the funds available, alternative proposals or bids were requested providing for the omission of certain work and the substitution of less expensive materials in some instances than those provided in the main proposals. (Tr. 13.)

The contract was awarded to John C. Robinson, of Chicago, appellant's decedent, and was entered into August 30, 1905, the contract price being $1,037,281.69. The work was to be completed by October 15, 1906. (Tr. 14, 50.) In the event sufficient funds should subsequently become available for their restoration, 32 omitted items were to be restored.

The pertinent provisions of the contract (Tr. 50, 52), which cover the disputed items are as follows (italics ours):

> It is expressly covenanted and agreed by and between the parties hereto *that time is*

and shall be considered as of the essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of four hundred twenty dollars, for each and every day the said party of the second part shall be in default, which said sum of four hundred twenty dollars per day, in view of the difficulty of estimating such damages with exactness, is hereby expressly *fixed, estimated, computed, determined, and agreed upon* as the damages which will be suffered by the party of the first part by reason of such default, and it is undertood and agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to sue for and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for.

* * * * *

It is further covenanted and agreed that the party of the first part shall have the right to require that any particular portion of the

work here provided for shall be completed within such time as may be hereafter definitely specified by the said party of the first part in written notice to the said party of the second part; and that should the said party of the second part fail to complete such particular portion of the work within the time so specified, or fail to complete the entire work contemplated by this contract within the time or times herein stipulated or provided for, or fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided, the said party of the first part may withhold all payments for work in place until final completion and acceptance of the same, * * *.

It is further covenanted and agreed that the said party of the first part shall have the right of suspending the whole or any part of the work herein contracted to be done whenever, in the opinion of the Architect of the building, or of the Supervising Architect, it may be necessary for the purposes of advantages of the work, * * * provided, that for all such suspensions and other delays caused by the said party of the first part *the party of the second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect;* provided, *that no claim shall be made or allowed to the said party of the second part for any damages which may arise out of any delay caused by the said party of the first part.*

The contractor proceeded with the construction. The additional funds having become available, on October 22 and 31, 1906, the Secretary of the Treasury directed the contractor to restore or include in the work the major portion of the 32 omitted items. The contract price was increased $200,044.01, and the period of the contract was extended to June 1, 1907 (Tr. 14, 54), and "*such extension is in lieu of all additional time which accrues to you on account of delays by the Government.*" The contractor and his several sureties consented. (Tr. 56.)

On the items in dispute the Court of Claims made the following Findings: (Tr. 21.)

> XXI. The contract called for most of the window sash of the building to be of solid oak, which wood is not especially suited for a damp climate and locality, such as lower New York City, on account of its liability to warp under damp and changing conditions of moisture and temperature.
>
> The contractor, before putting in the windows, called the architect's attention to this fact and suggested a modification of the form of construction of the sash for the purpose of obviating as much as possible the danger of their warping, which suggestion was not accepted by the architect or department. Owing to the fact above stated, and to the further facts that the materials of some of the sash were not of the best quality, nor thoroughly seasoned, and that the workmanship in their construction and installation was in some instances not of first-class character, there

occurred, before the completion of the building and within one year after the issuance of the department's certificate for final settlement, much warping, shrinking, and misfitting in a very large part of these sash, which required extensive repairs of an expensive character. The department demanded of the contractor that he make these repairs, which he refused to do except as extra work for which he should receive extra compensation. To this the department would not agree. Subsequently the contractor repaired a small part of these windows, about 12 in number, but under written protest and notice to the department that it was extra work for which he expected extra compensation. Later he presented a claim of $1,043.69 for this work, which was disallowed by the department.

XXII. In a report of February 7, 1908, to the Supervising Architect, the architect of the building recommended that the department retain from the contract price for the work the sum of $12,000 for the repair of said window sash and of window frames, and the completion and repair of certain other items of work on the building which the contractor had failed to do, any balance remaining over from the work to be paid to the contractor; and upon this report and recommendation the Supervising Architect, in his report and recommendation of March 13, 1908, to the Secretary of the Treasury for final settlement with the contractor, recommended the retention of said sum for the purpose stated. In accordance with these recommendations said sum was, against the contractor's protest, so retained by the department, and against

this retained sum there were subsequently charged by the department expenditures, etc., as follows: (Tr. 23.)

1. For repairing said window sash, and also some of said window frames, and for repair and completion of some other work which the contractor had failed to perform $10,401.45, the greater part of which sum was for sash repairs.

* * * * *

XXIII. The completion of the contract was delayed 121 days beyond June 1, 1907, the termination of the contract period as extended by the order and supplemental agreement set out in Finding III. Of this delay 12 days were held by defendant to be chargeable to the Government on account of delays in approving and returning the contractor's drawings. The remaining 109 days were held chargeable to the contractor, and liquidated damage therefor at the contract rate of $420 per day, amounting to $45,780, was, against the contractor's protest, charged and retained against him in the department's proffered final settlement on the contract, which sum the defendant still retains.

Of the total delay in the completion of the contract but 61 days' delay was due to the fault of the contractor, the remainder of such delay being due to suspensions and other delays in the work caused by the defendant subsequent to October 22, 1906. The amount of the liquidated damages charged and retained against the contractor by the defendant on account of delay for which the contractor was not responsible, and was therefore not chargeable, was $20,160 (Tr. 23).

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Findings XXI and XXII are assailed on the ground that after the contract was performed and the work was commenced appellant objected to the specifications calling for solid oak sash and specially directed the attention of the Government to the fact that such solid oak sash in window frames would be sure to warp and twist, due to warm inside air and cold outside air, especially in the damp atmosphere of lower New York City.

Finding XXIII is assailed on the ground that as the Government itself was guilty of delays, the Court of Claims had no right to enforce against appellant the liquidated damages clause by apportioning the delays between the parties (Br. 21) and fixing the damages accordingly.

ARGUMENT.

I.

APPELLANT ENTERED INTO AN UNAMBIGUOUS CONTRACT, PLAIN AND COMPREHENSIVE IN ITS TERMS, AND AFTER THE CONTRACT WAS EXECUTED AND THE CONSTRUCTION COMMENCED IT PASSED BEYOND THE POWER OF APPELLANT TO ESCAPE THE CONSEQUENCES IN THE ABSENCE OF ANY FINDING OF FRAUD OR MISREPRESENTATION ON THE PART OF THE GOVERNMENT OR ITS OFFICERS OR AGENTS.

The proposal for interior finish of the United States Custom House at New York, March 9, 1905 (Tr. 30, 40, 49), called for oak window sash (Tr. 38), solid oak interior window frames, frames for first and second stories of quartered white oak (Tr. 38); and elsewhere, including corridors, frames and sash of plain white oak (Tr. 38).

The proposals were made a part of the contract. (Tr. 48, 49.)

The contract provided (Tr. 51):

> It is further covenanted and agreed by and between the parties hereto that *all materials furnished and work done under this contract shall be subject to the inspection of the Architect of the building, the Supervising Architect, the superintendent of the building, and of other inspectors appointed by the said party of the first part, with the right to reject any and all work or material not in accordance with this contract; and the decision of the Architect of the building, when approved by the said Supervising Architect as to quality and quantity shall be final.* And it is further covenanted and agreed by and between the parties hereto that said party of the second part will without expense to the United States, within a reasonable time to be specified by the Architect of the building, or by the Supervising Architect, remedy or remove any defective or unsatisfactory material or work; and that in the event of the failure of the party of the second part immediately to proceed and faithfully continue so to do, said party of the first part may have the same done and charge the cost thereof to the account of said party of the second part.

The proposals which were made a part of the contract also provided (Tr. 32):

> The said Cass Gilbert, either personally, or by duly authorized representative, shall have the power and authority to inspect,

examine, and approve or reject materials, methods, and workmanship furnished or used under this contract, and to direct the conduct, management, and progress of the work and any or all parts of the same, with the exception, that orders involving modifications in the provisions of the contract or in drawings, letters or specifications forming a part thereof shall be subject to and require the written approval of the Secretary of the Treasury.

* * * * *

The Architect shall be the judge as to what constituted a "reasonable notice" to Contractor, whether or not workmanship or materials supplied are "suitable," "proper," "satisfactory," "approved," "necessary," "equal to" or in condition described by words of similar intent.

* * * * *

Inspection:

Each bidder must understand that, should his proposal be accepted, the materials delivered and the work performed by him at any and all times during the progress of the work, shall be subject to the inspection of the Architect or his authorized representative, with the right to accept or reject any part thereof, that, in the opinion of the said Architect or his authorized representative, is not in accordance with the drawings and specifications; and that he must, at his own expense, within a reasonable time to be specified by the Architect, remedy any defective or unsatisfactory material or work, and

in the event of his failure to do so, after eight days' notice, the Department shall have the right to have the same done and to charge the cost thereof to the Contractor's account.

The Court of Claims in its opinion held (Tr. 26):

> The other question involves the withholding by the Government of $12,000, mentioned or referred to in Findings XXI and XXII.
>
> In the contract the contractor undertook to guarantee the condition of the work for one year after acceptance. The sum mentioned was retained to pay for repair work which the contractor was called upon to do. It is true that the contractor suggested that a modification be made in the specification of certain material, and called attention to the fact that this material was not well suited to the climatic conditions, but nevertheless the provision to which he assented was incorporated in and made a part of the contract, and was to the effect that the condition was guaranteed for a definite period. It is too late, after contracting to do the repairs, to interpose the objection that the material (as in this case solid oak) was liable to warp. If it was not his purpose to guarantee the condition when oak was used the contract should not have said what it does say. If it be assumed that his judgment about the material to be used was better than that of the architect, it is yet true that he undertook to do the work, and guaranteed its condition with the material the architect had specified, and having failed and refused to do the repairs, the Government

> was within its rights when it caused them to be done at his expense. We think, however, that the contractor is not chargeable with the item of $1,072.26 for the architect's services, nor for the other item of $205.09, this latter not definitely appearing to be for repair work which the contractor was obligated to do.

Appellant challenges this holding on the ground that the defects "were due to faulty and improper specifications complied with by the contractor only after protest and prediction that strict compliance would result in the very defects which later developed." (Br. 42.) It is further argued "that the matter after all is but a phase of the general legal principle that a party can not recover for his own negligence (Br. 42); and again, "How much the predicted warping affected adjacent material and made possible a claim, after the event, it was not good or well installed in the first place is manifestly impossible." (Br. 43.)

The whole argument of appellant on this point would seem to be against his own contract which he signed and failed fully to discharge. The atmosphere of lower New York was no damper when the oak was placed in the building than it was when appellant signed the contract; nor could it well be claimed that the Government or its Supervising Architect were in any way responsible for the dampness of the atmosphere of lower New York. Moreover, the architect found that some of the work was faulty. That the appellant seeks to escape the consequences of his own contract is clear.

In *Dermott* v. *Jones*, 2 Wall. 1, 7, 8, this Court, speaking through Mr. Justice Swayne, said:

> The specifications and the instrument to which they are annexed constitute the contract. They make a common context, and must be construed together. In that instrument the defendant in error made a covenant. That covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.
>
> * * * * *
>
> The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract

fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.

In *Brinck* v. *United States*, 53 Ct. Cl. Rep. 170, 176, 177, 179, the Court of Claims said:

> The chief engineer, after giving all parties a full hearing, decided that the estimates made and submitted on May 14, 1907, should stand, and upon that basis decided there was due to the contractors the sum of $15,550.90. This sum the contractors refused to receive and brought this suit. The specifications provided:
>
> "Upon all questions concerning the execution of the work, and the classification of the material, in accordance with the specifications, the decision of the engineer shall be binding on both parties."
>
> After a careful review and consideration of the decisions of this court and of the Supreme Court of the United States the following seems to be the well-established rule: Where there is a provision in a contract making the decision of an engineer officer or other officer final as to the quality and quantity, distance to be ascertained, classification of material, or any other subject matter in the contract which may be matter of dispute and which may arise during the execution of the work, the decision of the engineer or other officer will be treated as final by the courts, and will not be subject to review by them in the absence of fraud or such gross error as implies bad faith or a failure to exercise an honest judgment in the premises. *McBride Electric Co.* v. *United*

States, 51 C. Cls. 448, 456; *Pacific Hardware Co.* v. *United States*, 49 C. Cls., 327; *McLaughlin & Co.* v. *United States*, 37 C. Cls., 150, 188; *Barlow et al.* v. *United States*, 35 C. Cls., 514, 546; *Kennedy* v. *United States*, 24 C. Cls., 122, 139; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S., 387, 393; *Ripley* v. *United States*, 233 U. S., 695, 704; *United States* v. *Barlow*, 184 U. S., 123, 133; *United States* v. *Gleason*, 175 U. S., 588, 602, 607; *Chicago, Santa Fe & California Railroad Co.* v. *Price*, 138 U. S., 185, 193; *Martinsburg & Potomac Railroad Co.* v. *March*, 114 U. S. 549, 550; *Sweeney* v. *United States*, 109 U. S., 618, 620; *Kihlberg* v. *United States*, 97 U. S., 398, 401.

* * * * *

And in the same case the court proceeds further to point out that it was not competent for the court to go back of the judgment of the engineer and to revise his action by the views of the court.

Again, in *Ripley* v. *United States*, *supra*, the court in passing upon a clause in a contract similar to the one now under consideration, after stating that there was no finding of bad faith on the part of the officer, said:

"But the contract did not contemplate the opinion of the court should be substituted for that of the engineer."

In *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 164, 165, this Court, speaking through Mr. Justice McKenna, said:

It would seem that the very essence of the promise of a contract to deliver articles

is ability to procure or make them. But claimant says its ignorance was not peculiar, that it was shared by the world and no one knew that the process adequate to produce 14-inch armor plate would not produce 18-inch armor plate. Yet claimant shows that its own experiments demonstrated the inadequacy of the accepted formula. A successful process was therefore foreseeable and discoverable. And it would seem to have been an obvious prudence to have preceded manufacture, if not engagement, by experiment rather than risk failure and delay and their consequent penalties by extending an old formula to a new condition.

But even if this can not be asserted, the case falls within *The Harriman*, *supra*, where it is said that "the principle deducible from the authorities is that if what is agreed to be done is possible and lawful it must be done. Difficulty or improbability of accomplishing the undertaking will not avail defendant. It must be shown that the thing can not by any means be effected. Nothing short of this will excuse performance."

In *McArthur Bros. Co.* v. *United States*, 258 U. S. 6, 12, this Court, speaking through Mr. Justice McKenna, said:

The elements which existed in each of the cited cases are absent from the case at bar. In the case at bar the Government undertook a project and advertised for bids for its performance. There was indication of the manner of performance but there was no knowledge

of impediments to performance, no misrepresentation of the conditions, exaggeration of them nor concealment of them, nor, indeed, knowledge of them. To hold the Government liable under such circumstances would make it insurer of the uniformity of all work and cast upon it responsibility for all of the conditions which a contractor might encounter and make the cost of its projects always an unknown quantity. It is hardly necessary to say that the cost of a project often determines for or against its undertaking.

II.

THE LIQUIDATED DAMAGES CLAUSE IS EQUALLY PLAIN AND UNAMBIGUOUS AND THE FINDINGS WOULD INDICATE THAT THE COURT OF CLAIMS DEALT FAIRLY WITH THE APPELLANT.

The proposals which were made a part of the contract provide (Tr. 31) (italics ours):

> Delays: Each bidder must submit his proposal with the distinct understanding that, in case of its acceptance, *time for the completion of the work shall be considered as of the essence of the contract, and that for the cost of all extra inspection, and for all amounts paid for rents, salaries of contingent force, and other expenses entailed upon the Government by delay in completing the contract, the United States shall be entitled to the fixed sum of Four hundred and twenty dollars ($420.00) as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States: Provided, however, That the collection of said sum may, in the discretion of the Secretary,*

be waived in whole or in part; and that the contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government.

The Department, acting for the United States, reserves the right to suspend any portion of the work embraced in the contract, whenever, in its opinion, it would be inexpedient to carry on said work. * * *

Time to Complete: Work must begin shortly after the contract is signed, and the entire work must be completed on or before July 15, 1906. The bidder will consider this as an essential item in preparation of his bid.

Bidders must also understand that *in the performance of work in the building by various contractors at the same time, some hindrance and delay in execution of certain plans for progress will be probable and allowance be made therefor. Time is held to be an essential consideration of this contract,* and it is hereby particularly required and provided that this work as a whole, and any and all parts of the same, shall progress at all times with a proper and sufficient force of workmen and an ample supply of materials, and the work shall be conducted and managed in a manner satisfactory to the Architect, and which, in the opinion of the Architect and Supervising Architect, shall insure its completion within the time stipulated.

The contract of which the proposals were made a part provides (Tr. 52, 53):

It is further covenanted and agreed that the said party of the first part shall have the

right of suspending the whole or any part of the work herein contracted to be done whenever, in the opinion of the Architect of the building, or of the Supervising Architect, it may be necessary for the purposes or advantages of the work, and upon such occasion or occasions the said party of the second part shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; provided, that for all such suspensions and other delays caused by the said party of the first part the party of the second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect; *provided, that no claim shall be made or allowed to the said party of the second part for any damages which may arise out of any delay caused by the said party of the first part.*

The amendment or supplement to the contract of October 22, 1906, provides (Tr. 54):

> It is understood and agreed that it is a condition of this action that the time for completion of all work included in your contract, and that hereby ordered, is June 1, 1907, and that such extension is in lieu of all additional time which accrues to you on account of delays by the Government * * *.

In its opinion the Court of Claims said (Tr. 24, 25, 26) (italics ours):

> The contract contains a clause providing for liquidated damages to be paid by the contractor in case he fails to perform within contract time. The act of 1902, 32 Stat. 326, requires that clause in contracts such as this.
>
> The work was not completed or accepted until October, 1907, or 121 days after the stipulated time in the supplemental contract, namely, June 1, 1907. In the attempted adjustment of that matter as made by the Treasury Department, of which the contractor complains, he was charged with 109 days' delay, the remaining 12 days having been deducted from the total because of delay by the Government in furnishing "certain drawings." The act of 1902 mentioned in the specifications empowers the Secretary of the Treasury to remit the whole or any part of the liquidated damages as in his discretion may be just and equitable. This act, being in existence when the plaintiff's contract was made, must be read into the contract itself. In determining whether anything would be remitted the Secretary did not feel bound by the contract provision relative to the ascertainment of a cause of delay by the supervising architect, but appointed a board to investigate the facts and report to him with their recommendation as to whether any waiver of the liquidated damages should be made by him.
>
> While it is argued with much force by the Government that this action of the Secretary

is conclusive on the parties, we think the better view is against that contention when all the terms of the contract are considered. It provided that the Government could suspend the work in whole or in part, and that for "all such suspensions" and other delays caused by the Government an allowance should be made to the contractor, and it also provided that no claim for damages should be made by, or allowed to, the contractor for any damages arising out of delays caused by the Government. This latter provision is valid and enforceable against the contractor, *Wells Bros. Co. Case*, 254 U. S. 83, 87 (54 C. Cls., 206), but the former provision requires that some account be taken of the "suspensions" in ascertaining what, if any, additional days' time should be allowed the contractor. It is not every suspension of part of the work that will give the contractor additional time, but it must have been such a suspension of part that has operated to delay the whole work. If there were a suspension of a part that had no effect on the balance of the work, or where the contractor could proceed with other of the work unhindered by the particular suspension, it could not be said to have delayed the ultimate performance of the whole so as to entitle him to additional time.
* * *

The contention by the plaintiff that he is not chargeable with any liquidated damages can not be sustained. The case of United Engineering Co., 234 U. S. 241, is not applicable to the instant case. The contract provides

a definite period from which the liquidated damages are to be computed, and in case of delays by the Government or suspensions, in the circumstances stated above, it is provided that one day be added to the contractor's time for each day of delay. *These delays being ascertained, the time of completion is as definitely fixed as if written in the contract itself. The theory that the entire liquidated clause is defeated by a provision intended to protect and save it, and at the same time to accord to the contractor some relief, is not to be adopted where the contract shows plainly that its intent is to furnish the means of definitely ascertaining the period during which the contractor should be charged with the agreed damages. There is no question here of an apportionment of delays.* The contract itself requires that under certain stated conditions additional days shall be given in which the contractor may perform, and it is the duty of the court to give effect to this provision. We have therefore ascertained the number of days which should be added to the contract period from June 1 and extended the time accordingly, as contemplated by the clause under consideration.

The whole argument of counsel for appellant appears to be that the Court of Claims, regardless of these specific provisions in the proposals and contract, apportioned the delays as between the parties and under the contract allowed liquidated damages against appellant. And numerous authorities are cited to sustain the proposition that liquidated damages may not be recovered for delay in discharging the contract

when both parties are at fault. But there is no such case here.

The proposals and the contract provide that the United States shall be entitled to $420 "as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States" (Tr. 31); and then it is provided "that the contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government." (Tr. 31.) Under his authority to waive any part of the liquidated damages (Tr. 31), the Secretary of the Treasury, in extending the time for the completion of the work from October 15, 1906 (Tr. 14), to June 1, 1907 (Tr. 54), stated that "such extension is in lieu of all additional time which accrues to you on account of delays by the Government" (Tr. 54).

It would appear that the Court of Claims dealt very liberally with the appellant. Thus, with respect to Finding XXIII (and taking into account that certain suspensions on the part of the Government which were not lifted when the agreement of October 22, 1906, was made extending the time to complete the work to June 1, 1907), the Court of Claims said (Tr. 25):

> We are not concerned with suspensions prior to the supplemental contract of October, 1906, because that contract extended the time of performance and took account of delays to that time, but if a suspension made prior to the October contract on part of the work was

not lifted until after that date, and if such continued suspension of part so affected the whole of the work as to delay its completion within the contract time, then the suspension becomes material. And an instance of that kind happened. In August, 1906, an order directed the suspension of certain work, including marble work on the Bridge Street stairway No. 116, and the order to resume work was not issued until the end of March following—more than six months. The architect himself states that the contractor was delayed by these items and would doubtless claim exemption upon them, but also concluded that the primary cause of the delay was the contractor's refusal to submit a reasonable bid for certain work. We take a different view of this matter and hold that inasmuch as the department could have fixed the price it need not have waited upon the contractor's bid, and in fact did not so wait, and that the suspension made in August and continued until nearly April did operate to delay completion of the work, which according to the supplemental contract was due to be completed by June 1. As early as December, and several times thereafter, the contractor had called on the department to be allowed to proceed with incidents connected with this particular work. We have not found that a period equal to the entire time of the suspension should be added to the time the contractor had within which to complete, but that a portion of it should be so added. Similarly, on account of other suspensions the contractor

should have additional time. The extension of one day for each day's delay in the performance of the entire work caused by suspensions at divers times of parts of the work has been found in Finding XXIII.

Counsel argues that the Court of Claims simply apportioned the delays on a fifty-fifty basis and awarded judgment accordingly.

Any examination of the Findings and opinion of the Court of Claims would indicate that the latter examined the evidence and under the terms of the contract computed the delays of the respective parties. Full allowance was made to appellant for the delays caused by the Government. That the Court of Claims was liberal in that behalf clearly appears from its opinion already cited.

In *Merchants Loan & Trust Co.* v. *United States*, 40 Ct. Cls. Rep. 117, 132, the Court of Claims said:

> The legal effect of the part of the contract referred to is that the entire work covered by the contract was to be completed within eight months from the date of the approval of the bond, and that any particular portion of the work should be completed within such reasonable time as might thereafter be definitely specified in written notice to the contractor, and should there be a failure to so complete the work in the time required the contractor should forfeit $200 per day as liquidated damages thereafter until the completion of the same, provided that if through any fault of the defendants the contractor should be de-

layed in the execution of the work included in the contract he should be allowed one day additional to the time stated for such completion for each and every day of such delay so caused by the defendants, and that no claim should be made or allowed for damages which might arise out of any delay caused by the defendants.

The provisions of the contract just recited are as valid and binding as any other part of it, and having been voluntarily entered into the contractor has agreed that no claim shall be made or allowed arising out of the delay caused by the defendants mentioned in the findings. Extra time to the contractor was made the equivalent for delay caused by the defendants; and the claimant has not shown that such extra time was refused by the defendants.

In respect to the right to recover damages for delays the contract is purely unilateral and is confined to such damages as might be caused by the contractor alone, and for the delays caused by the defendants there can be no recovery.

In *Chouteau* v. *United States*, 95 U. S. 61, 68, this Court, speaking through Mr. Justice Miller, said:

It is very clear that both parties contemplated the probability that the work would not be completed at the precise period of eight months from the date of the contract. They also contemplated that changes would be made in the construction of the battery. They made such provision for these matters as they

deemed necessary for the protection of each party. For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made. There was a provision for delay, by which the contractor was to submit to pay $4,500 for every month of that delay. This provision, the only one on that subject, if strictly enforced, might have made him a still greater loser; but it seems to have been waived. But we are very clear that without any such provision he must be held to have taken the risk of the prices of the labor and materials which he was bound to furnish, as every other contractor does who agrees to do a specified job at a fixed price. It is one of the elements which he takes into account when he makes his bargain, and he can not expect the other party to guarantee him against unfavorable changes in those prices.

In *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 113, 121, this Court, in reversing a judgment of the Court of Claims with directions that the petition be dismissed, said:

> The eighth finding of the Court of Claims is in effect that the failure to deliver was caused in part by both parties; that the total number of days failure was 1,096 days, of which 496 were caused by the defendant's officers, and it does not mean that the court regarded itself as bound by the decision of the Chief of Ordnance as to the number of days that the claimant or the Government delayed the delivery. It

found the number of days as stated, and that the transactions were so involved that whether the defendant should be charged with a greater proportion of the delays than set forth in the finding, the court could not decide on the evidence produced.

In *Wise* v. *United States*, 249 U. S. 361, 365, this Court, in affirming a judgment of the Court of Claims in a case in which the provisions of the contract were again almost an exact duplicate of the provisions of the contract here involved, and speaking through Mr. Justice Clarke, said:

> The subject of the interpretation of provisions for liquidated damages in contracts, as contradistinguished from such as provide for penalties, was elaborately and comprehensively considered by this court in *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642, applied in *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, and the result of the modern decisions was determined to be that in such cases courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipu-

lated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention, or oppression. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.

III.

THE CHARGE AND ARGUMENT THAT THE ARCHITECT ACTED CAPRICIOUSLY AND THAT THE COURT OF CLAIMS ATTEMPTED IN ITS OPINION TO GET AROUND THE AUTHORITIES CANNOT BE SUSTAINED.

The charge in the petition (Tr. 5) "That the architect was capricious, unfair, and unreasonable in the supervision and judgment of work, labor, and materials and unreasonably and unwarrantably rejected material and labor after the same were long in place though having full and early opportunities for inspection of materials and of labor," and the further charge (Tr. 5) that claimant "was subjected to unreasonable and capricious delays and losses in other details of performance of his contract that were vexatious, harassing, and embarrassing, but were submitted to rather than vex the appellate authorities with the same," and that "these capricious, unfair, and unreasonable acts delayed claimant in performance of his contract and increased the cost thereof" (Tr. 5) are not borne out by the record.

Moreover, pursuing these charges against Mr. Cass Gilbert,[1] who was the architect in charge, counsel for appellant in their brief say (Br. 36):

> He was the legal representative of one party to the contract, and not even an unbiased representative, for he had tried to prevent appellant as the lowest bidder getting the contract and with the architect was overruled by the Secretary. Appellant's troubles began that day.

Appellant appears to adopt very much the same attitude toward the Court of Claims, for with respect to the opinion of the latter, counsel say (Br. 33, 34):

> The Court of Claims attempts in its opinion to get around these authorities and to hold they do not apply with the assertion that it, in its conclusion awarding the amount in dispute as to 60 days at $420 per day to the contractor and 61 days to the United States, is not "apportioning" the delay due to mutual defaults, that *United Engineering Co.* v. *The United States*, *supra*, is not applicable, and that it is, instead of "apportioning" the time between owner and contractor, "computing" the same under a contract provision not nam-

[1] Architect for the Capitol and other buildings, St. Paul; Essex County house, Newark, N. J.; Agriculture Building, Omaha Exposition, 1898; Brazer Building in Boston; Broadway-Chambers Building, New York; West Street Building, Woolworth Building, and U. S. Custom House, New York; Art Building and Festival Hall, St. Louis Exposition; Central Public Library, St. Louis; Detroit Public Library; general plan of University of Minnesota, University of Texas, and for completion Arkansas Capitol, Little Rock; U. S. Treasury Annex, Washington, D. C.; Army Supply Base, Brooklyn, N. Y.; Federal Reserve Bank, Minneapolis; one of architects new Union Club, New York. (Who's Who in America, Vol. 12, 1922-1923, Cass Gilbert.)

ing a date but enabling one to be definitely fixed—by computing or apportioning the fault between the parties. To Counsel it seems like an advocate's special pleading of a hard case, swaying the law not interpreting it.

In *Wells Brothers Co.* v. *United States*, 254 U. S. 83, 87, in affirming the judgment of the Court of Claims, dismissing a petition based on a contract the provisions of which, as the face of this Court's opinion will disclose, were almost a duplicate of the provisions of the contract in the instant case, and after reviewing the various provisions of the contract, Mr. Justice Clarke, speaking for the Court, said:

> Men who take million-dollar contracts for Government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as are complained of by the higher price exacted for the work.
>
> We are dealing with a written contract, plain and comprehensive in its terms and the case is clearly ruled in principle by *Day* v. *United States*, 245 U. S. 159, 161; *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 164, 165; *Dermott* v. *Jones*, 2 Wall. 1, 7, and *Chouteau* v. *United States*, 95 U. S. 61, 67, 68.

IV.

CONCLUSION.

The findings and opinion of the Court of Claims, and the course of the Government in not prosecuting a cross appeal, all protect appellant to the fullest extent to which he is entitled. The judgment of the Court of Claims should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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